



**Gacoki v Gathu (Environment & Land Case 23 of 2021)  
[2023] KEELC 17604 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17604 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 23 OF 2021**

**EC CHERONO, J**

**MAY 30, 2023**

**BETWEEN**

**NANCY WANJIKU GACOKI ..... APPLICANT**

**AND**

**STEPHEN GATURA GATHU ..... RESPONDENT**

**JUDGMENT**

- 1 The Applicant, Nancy Wanjiku Gacoki commenced this suit vide Originating Summons dated July 1, 2021 and filed in Court on July 5, 2021 seeking the following Orders;
  1. That the joint proprietorship in respect of LR NO Kirinyaga/gathigiriri/2898 be severed.
  2. That the suit property be sold and the proceeds thereof be awarded to the applicant.
  3. That the Deputy Registrar or the Executive Officer be empowered to sign any documents that the Respondent May refuse to sign.
  4. Costs of the application be awarded to the applicant.
  5. Any other relief the Court may deem fit
- 2 The suit is supported by the affidavit of the applicant sworn on even date. The supporting affidavit is further supported by several annexures thereto which include a certificate of official search, a Sale Agreement, a Bank statement from Ollin Sacco and a Title deed for the suit property in the joint names of both the applicant and the respondent.
- 3 By way of a response, the respondent filed a Replying affidavit on July 19, 2021.
- 4 When this case came up for pre-trial directions on February 2, 2022, the respondent had not filed and served any response to the Suit (OS) and this Honourable Court directed the case to proceed as undefended.



6 During the hearing on 8/6/2022, a Mr Asiimwe for Mr Wairegi for the respondent stated that Mr Wairegi was not ready to proceed as he was unwell. Mr Muriithi for the Applicant strenuously opposed the application. In a brief ruling, this Honourable Court disallowed the application for adjournment and the case proceeded *Ex-parte*.

### **Applicants Case & Submissions**

7 The plaintiff/Applicant testified on oath as PW1 and stated that She works at Gathigiriri Secondary School as a teacher. She stated that they used to cohabit with the respondent as Husband and wife from the year 2009 until 218. She stated that while they were cohabiting with the respondent, She bought the suit land parcel NO Kirinyaga/gathigiriri/2898 from one Michael Mwaura. She said that she applied for a loan from her Sacco, namely Ollin Sacco. The Applicant further stated that She applied for an investment loan of Kshs 650,000/= in February, 2017 and received the same on February 28, 2017

8 She further stated that the purchase price of the suit land was Kshs 460,000/= and she paid a down payment of Kshs300,000/= on 3/3/2017. The Applicant also stated that she paid the down payment of Kshs 300,000/= through a bankers cheque from Ollin Sacco and the balance of Kshs 157,250/ through a cheque. She said that when she was buying the suit land, she was advised by a friend to register the property in the joint names with the respondent for the security of the children she sired with the respondent. The Applicant stated that on July 15, 2020, she applied for another loan of Kshs 1.19 million from Ollin Sacco which she used to build a three bedroomed house, a store and a kitchen. She said that the loan is being deducted from her salary through check-off system and that the respondent never contributed any monies towards the purchase of the suit land nor the construction of the house thereon. She stated that she has not seen the respondent since 2020 when he sent her a text message that he had since gotten married and were living in Mahimahiu.

9 On cross-examination, the applicant stated that they started cohabiting with the respondent when they were students at Maseno University until they completed in the year 2011. Thereafter, she was employed by the Board of Management(BOM), Gathigiriri Secondary School and in 2015, She was employed by the Teachers Service Commission on permanent and pensionable terms. She further stated that they have three kids with the respondent and that they were only cohabiting and not married with the respondent. She stated that though the agreement indicates that they purchased the land with the respondent, the truth of the matter is that she was actually the one who paid the purchase price alone using a loan from Ollin Sacco and later borrowed an additional loan she used to construct a three bedroomed house and that she is still repaying the loan to date.

10 The Counsel for the plaintiff submitted on the following two issues;

- a. Whether the court can order severance of a joint proprietorship?
- b. Whether the suit property can be sold and proceeds be given to the plaintiff?

11 On the first issue, the counsel submitted in the affirmative and argued that the court has jurisdiction. He referred the case of *NSG V SCG (2019) Eklr*

12 He further submitted that as noted in the cited case above, ELC Court has concurrent jurisdiction with matrimonial disputes court and submitted that the evidential burden lies with the plaintiff to prove 100% contribution to acquiring property and in this case, evidence has been shown that the plaintiff took the loan and paid full purchase price and that no evidence by the defendant of contribution

13 The learned counsel also submitted that no evidence in rebuttal of the plaintiff's evidence that registration of the defendant was on a mistaken belief and that the plaintiff is in user and occupation



and also repaying the loan through her salary as a teacher. He referred to the case of [OKN v MPN \(2017\) eKLR](#)

### Respondent's Case And Submissions

- 14 This suit proceeded *Ex-parte* after an application for adjournment by a Mr Asimwe Advocate instructed to hold brief for a Mr Wairegi Advocate for the defendant was disallowed and the respondent himself was also absent.
- 15 However, the respondent through his Advocates M/S Wairegi Kiarie & Associates filed their written submissions dated June 20, 2022 and framed two issues for determination as follows;
- a. Whether this Court has jurisdiction to hear and determine this suit?
  - b. In the event the joint tenancy is severed, what entitlement do each party have?
- 16 On the first question, the respondent submitted that the question the court seeks to answer is whether there exists a presumption of Marriage from the evidence adduced. He also submitted that there exists an admission that the parties in court have cohabited for a period of 12 years. From that admission, the respondent submitted that the parties in court were married having lived as husband and wife for more than 12 years with their relationship blessed with children as such giving rise to a presumption of Marriage. He further submitted that in the absence of any evidence to the contrary, he submitted that the suit property is matrimonial property for all intents and purposes.
- 17 The respondent further submitted that the court should be guided by the provisions of the [matrimonial property Act](#) in seeking to sever the existing joint tenancy that exists and in particular in the provisions of Section 7 and 17 thereof.
- 18 In conclusion, the respondent submitted that having established existence of a marriage, severance of the joint tenancy cannot ensue if the union has not been dissolved as such the matter is not ripe for determination.
- 19 On the second issue, the respondent submitted that the Agreement for sale produced as an exhibit in court affirms that the suit property was purchased jointly by the Applicant and the Respondent. He further submitted that the agreement does not confer superior rights to the Applicant. He submitted that the parties' intention was to create a joint tenancy thus informing the decision to have the suit property registered in their joint names and therefore they both have equal rights and interests over the suit property and in the event the court is persuaded to sever the joint tenancy, then the parties are entitled to an equal share of the suit property.
- 20 The Respondent relied on the following citations and Authorities;
1. *Bromly Family Law*, 5<sup>th</sup> Edition 64
  2. [Halsbury's Laws Of England](#) 3<sup>rd</sup> Edition Vol 19 PARA. 1323
  3. Section 7, [Matrimonial Property Act](#)
  4. Section 67 & 68 of the [evidence Act](#) Cap 80
  5. [David Sironga Ole Tukai v Francis Arap Muge & 2 Others](#) Civil Appeal NO 76 of 2014 (2014) eKLR
  6. [Jane Njoki Kubai & Anor v James Kubai Mathu & Anor](#) (20200) eKLR
  7. [KO & ANOR V JO](#) (2018) eKLR



8. [PNN V ZWN](#) (2017) eKLR

### **Legal Analysis And Decision.**

- 21 I have considered the testimony by the Applicant and the documents produced as exhibits in support of the claim herein. I have also considered the rival submissions by both Advocates for the Applicant and the respondent as well as the relevant law.
- 22 From the pleadings and the documents produced by the plaintiff, the following issues comment for determination;
- a. Whether the plaintiff/Applicant has proved her claim for severance of joint proprietorship?
  - b. Whether this court has jurisdiction to hear and determine this suit?

### **Whether the plaintiff/Applicant has proved her claim for severance of the joint proprietorship?**

- 23 As to whether the plaintiff/Applicant has proved her claim to the required standard, it is clear the plaintiff gave sworn testimony and explained how she bought the suit property using a loan she borrowed from Ollin Sacco on March 3, 2017 in the Sum of Kshs 460,000/ She further stated that she made a down payment of Kshs 300,000/ leaving a balance of Kshs 160,000/ which she paid later on March 9, 2017 making a total of Kshs 460,000/ being the consideration of the purchase price. A copy of the sale agreement and a bank statement from Ollin Sacco were produced as exhibits in this case. The plaintiff stated that when she buying the suit property, friends advised her to register the property jointly with the respondent as had sired him three children. After she paid the full purchase price, a title deed was issued in their joint names which was produced as P-exhibit NO 3.
- 24 It is clear from the evidence adduced under oath that the plaintiff solely paid the full purchase price for acquisition of the sui property LR NO Kirinyaga/gathigiriri/2898 Measuring approximately 0.04 Ha. The plaintiff/Applicant also stated on oath that she only made the respondent a joint owner due to advice by friends for the sake of the children she got with the respondent. Again, those averments given on oath have not been controverted. I find the testimony given by the plaintiff/Applicant credible. Other than his name appearing in the sale Agreement and the title deed, there is no substantial contribution made by the respondent towards the purchase of the suit property or the construction of the house thereon.
- 25 From the entirety of the evidence adduced, I am satisfied that the Applicant has adduced uncontroverted evidence towards the acquisition of the suit property that was registered in their joint names and the fact that she had no intention of owning the suit property jointly with the Respondent. The Applicant further stated that she made the respondent to be registered as a joint owner of the suit property on the advice of friends and on account of the children she got with him. Those averments have not been controverted.

### **Whether this Court has Jurisdiction to hear and determine this suit?**

- 26 The plaintiff in her Originating Summons dated July 1, 2021 is seeking for Orders *inter-alia* that the joint proprietorship in respect of the suit land parcel NO Kirinyaga/Gathigiriri/2898 be severed. At paragraph 19 of his Replying affidavit deposed that this Honourable Court is not seized of the requisite jurisdiction to hear and determine the dispute being a matrimonial cause. While dealing with a similar dispute, Hon Justice S Okong'o in ELC Case NO 174 of 2015(O.S) between [NSG V SCG](#) (2019) eKLR, the learned Judge held;



“ -----If I was called upon to determine the issue, I would have agreed with the applicant that this Court has Jurisdiction to determine the dispute. The applicant’s case as framed is for the severance of a joint tenancy. Under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011, this court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. Section 13(1) and (2) of the Environment and Land Court Act provides as follows;

“ 13. Jurisdiction of the court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to Environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
  - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, Mining, Minerals and other natural resources;
  - b. Relating to compulsory acquisition of land;
  - c. Relating to land administration and management;
  - d. Relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
  - e. Any other dispute relating to environment and land.”

27 The learned Judge also cited the case of Jane Wambui Ngeru v Timothy Mwangi Ngeru (2015) eKLR where the court held;

“---In addition if rights to matrimonial property are in dispute, section 17 of the Matrimonial Property Act of 2013 provides as follows;

1. A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
2. An application under sub-section(1)—
  - a. Shall be made in accordance with such procedure as may be prescribed;
  - b. May be made as part of a petition in a matrimonial cause; and
  - c. May be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

28 No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are Resident Magistrate’s Courts and within the limits provided under the law as to their jurisdiction.



- 29 It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to land.”
- 30 Again in *BWM V JMC*, Murang’a ELC Case NO 379 of 2017(2018) eKLR, the court held;  
“For avoidance of doubt, the Court notes that the *Matrimonial property Act* does not define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to occupation, use and title to land. I find to oust the jurisdiction of this court and I proceed to determine the preliminary objection.”
- 31 In the same manner, I find the question whether this Honourable court has jurisdiction to hear and determine this dispute is answered in the affirmative.
- 32 In view of all the matters aforesaid, I find the suit herein merited and do hereby enter judgment for the plaintiff/Applicant against the defendant/respondent as follows;
1. That the joint proprietorship in respect of Lr No Kirinyaga/Gathigiriri/2898 be and is hereby severed.
  2. That the suit property Lr No Kirinyaga/Gathigiriri/2898 to be sold and the proceeds thereof be awarded to the plaintiff/Applicant.
  3. That the Deputy Registrar, Bungoma ELC is hereby Authorized to sign all statutory documents that the Respondent may refuse to sign
  4. The land Registrar, Kirinyaga County to dispense with the production of statutory documents required from the defendant/respondent towards execution of the sale of the suit property under paragraph (2) above.
  5. The costs of this suit to be borne by the Respondent.

**DATED, READ AND DELIVERED VIRTUALLY AT BUNGOMA THIS 30<sup>TH</sup> DAY OF MAY, 2023**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of;

Mr Muriithi for the plaintiff/Applicant

Mr. Wairegi for the defendant/Respondent

M/S Joy C/A

